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Mr. James Frey
Assistant Director for Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

This letter is in response to your request for the Agency's views on the Department of Defense (DOD) report on a draft bill "To protect U.S. Government telecommunications from interception and interference by hostile foreign powers, and for other purposes". While the Agency certainly supports efforts to restrict the transfer of cryptographic equipment to foreign powers, we cannot for the reasons stated below support enactment of this draft bill and therefore we must object to the DOD report supporting the bill.

We understand that one of the purposes of the bill is to provide additional legal authority to deny foreign countries access to cryptographic and communication security information. It is our view that there is sufficient legal authority to prevent the sale of classified cryptographic information or equipment to foreign countries. This authority can be found in 18 U.S.C. §798, which imposes criminal penalties on those who provide cryptographic equipment or information to a foreign government. While it is true that national policy, as articulated in the National Telecommunications and Information Systems Security Instruction (NTISSI) No. 4001, has declassified certain cryptographic equipment, the policy itself states that such equipment employs classified cryptographic logic. Thus, Title 18 would also restrict the sale of unclassified cryptographic equipment that employs classified cryptographic logic. Furthermore, NTISSI No. 4001 gives the Director of the National Security Agency (NSA) the responsibility for establishing requirements for controlling the unclassified cryptographic equipment. Given the legal and policy structure in place to protect against the unauthorized transfer of cryptographic equipment to foreign nations, we do not believe there is any need for further legislation in this area.

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A second purpose of the bill is to provide the Secretary of Defense with the authority to prescribe minimum standards governing the purchase, use and disposal of cryptographic equipment by federal agencies and contractors. Again, we believe that DOD already has such authority. This authority can be found in NSDD 145 which charges the Director of NSA, in his role as the National Manager for Telecommunications Security and Automated Information Systems Security, with prescribing minimum standards, methods, and procedures for protecting cryptographic and other sensitive technical security material and information. Federal departments and agencies, and contractors with the government are already bound by standards prescribed by NSA. Given this policy, there does not appear to be any need for legislation granting DOD additional authority.

In addition to being unnecessary, the draft bill could jeopardize an arrangement carefully worked out between NSA and the Central Intelligence Agency (CIA) regarding protection of intelligence sources and methods. Under NSDD 145 the Director of NSA is given primary responsibility to set standards for protection of cryptographic equipment and information. The Directive does, however, recognize the need to maintain the authority of the Director of Central Intelligence (DCI) in the area of technical security countermeasures. It explicitly provides that "Nothing in this Directive alters the existing authorities of the Director of Central Intelligence, including his responsibility to act as Executive Agency of the Government for technical security countermeasures". Enactment of the draft bill would grant the Secretary of Defense exclusive authority to regulate the use and protection of cryptographic equipment. We do not believe such a grant of exclusive authority to the Secretary of Defense is consistent with the determination made by the President that the Directive should not alter any existing authorities of the DCI.

We appreciate the opportunity to comment on this bill and the draft DOD report. If you have any further questions regarding our position, please contact me or [redacted] of my staff at [redacted]

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Sincerely,

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Director, Office of Legislative Liaison